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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, and THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioner and both Respondents have consented in writing to this brief. Copies of such consent have been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors, or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations are also eligible for membership. NTCA members all are leaders duly elected or appointed by their people according to their tribal constitutions or governing instruments. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA. The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA declares it its purpose, among other things, to ensure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not impaired or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

In this case, Petitioner seeks plenary Supreme Court review of a decision by the Montana Supreme Court that the Fort Belknap Indian Community, in its corporate charter ratified pursuant to section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1970), waived its immunity from suit for damages for an alleged tort committed by a tribal police officer

in connection with a lawful arrest. The charter provision in question is section 5(i), which provides:

> The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:
>
> . . . .
>
> (i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.[1]

NTCA has a clear and vital interest in the interpretation of this "sue and be sued" provision. The Chairman of the Fort Belknap Indian Community is a member of NTCA. As a spokesman and representative for the reservation-based and federally recognized Indian tribes of this country, to whom the Government owes a unique responsibility, *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974), NTCA must challenge vigorously any encroachment upon Indian tribal sovereignty, so long recognized and protected by this and other courts, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U. N. Mex. 1971). This is, we submit, what the Montana Supreme Court has done, in a manner unforeseen and prohibited by Congress in its passage

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[1] The corporate charter of the Fort Belknap Indian Community is included fully in the Appendix to the Community's petition to this Court for a Writ of Certiorari.

of the Indian Reorganization Act, by the Department of the Interior and the tribes that developed these charters, and by this Court in its consistent decisions protective of Indian tribal sovereignty.

REASONS FOR GRANTING THE WRIT

I. The Question Whether Indian Tribes that Ratified Corporate Charters Pursuant to Section 17 of the Indian Reorganization Act Thereby Waived Their Immunity from Legal Suits Arising from Tribal Actions of Any Nature, Both Corporate and Governmental, Is a Federal Question of Supreme Importance to All Indian Tribes and Never Has Been Considered by this Court.

To remedy the ill effects caused by its earlier assimilationist and allotment legislation, Congress in 1934 passed the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973), a statute perhaps unequalled in importance to the Indian people, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 84, 123 n. 7 (U. N. Mex. 1971). The overriding purpose of the IRA is to revitalize tribal government and to rehabilitate the Indian's economic life. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 152 (1973). The essence of the Act is in sections 16 and 17. Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279, 298 (1935); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 965 (1972). Section 16 provides that a tribe could organize a government for the common welfare by adopting a constitution and by-laws. 25 U.S.C. § 476 (1970). Section 17 provides that a tribe could incorporate by vote of the adults on the reservation. 25 U.S.C. § 477 (1970). A tribe that has organized under section 16 need not incorporate.

Sections 16 and 17 provide for two separate mechanisms to establish two distinct organizations to accomplish two different goals. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 330 (U. N. Mex. 1971). This distinction has been enunciated consistently and forcefully by the Department of the Interior, the agency empowered to implement the IRA. The Department has held specifically that an Indian tribe organized pursuant to section 16 of the IRA is not the "same legal entity" as a corporation chartered on behalf of the newly organized tribe pursuant to section 17 of the Act. Memo. Sol. I.D., M-36515, 65 DEC. DEP. OF INT. 483 (1958). Relying upon an earlier decision, Memo. Sol. I.D., M-36119, 61 DEC. DEP. OF INT. 8 (1952), and on a study of the legislative background of the Act, the Department stated:

> The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.

65 DEC. DEP. OF INT. at 484. *See also* Memo. Sol. I.D., M-36545, Dec. 16, 1958 (unpublished); Memo. Sol. I.D., 57 DEC. DEP. OF INT. 145 (1940); Memo. Sol. I.D., March 25, 1939 (unpublished); Memo. Sol. I.D., Dec. 11, 1937 (unpublished). Accordingly, the Department of the Interior has held that powers conveyed to a tribal corporation in its charter have no operation with regard to actions of the tribe taken in its governmental capacity, unless those powers explicitly have been incorporated into the tribal constitution by reference. Memo. Sol. I.D., M-36545, Dec. 16, 1958 (unpublished).

The Montana Supreme Court disregarded the legislative scheme by holding that "a sue and be sued" provision, adopted only by the corporate organization, is to be applied to actions taken by the governmental organization. It was the first court to so hold.[2] Section 17 authorizes these charters to convey only those powers that "may be *incidental to the conduct of corporate business. . . .*" 25 U.S.C. § 477 (1970) (emphasis added). Section 5 of the Fort Belknap Indian

[2] There have been only two other decisions interpreting the "sue and be sued" provisions in tribal corporate charters. In *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966), the court held that the "sue and be sued" provision did not waive the tribe's traditional immunity from suit in a garnishment proceeding to subject property of the tribal corporation for the purpose of satisfying a judgment obtained against the corporation. In *Martinez v. Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962), the court held that the "sue and be sued" provision waived the tribe's immunity from suit against the corporation for allegedly denying plaintiff membership, and the benefits of membership, in the corporation. Both of these decisions involved suits against the tribal corporation for actions taken by the tribe in its corporate capacity.

Community's charter provides in boilerplate fashion that only "corporate powers" were conveyed. Surely, a "corporate power" to "sue and be sued" was not intended to reach an alleged tort committed in connection with an arrest by a tribal police officer, a purely governmental action. Indeed, if this charter provision was intended to stretch so far, it certainly would be void, because the Act does not authorize the conveyance of such powers that wholly are irrelevant to the conduct of tribal business.

If this Montana decision is allowed to stand, the very existence of the 88 incorporated tribes and the 67 incorporated native villages will be threatened.[3] None of these charters can be revoked or surrendered without an act of Congress. 25 U.S.C. § 477 (1970). By their participation in a legislative and administrative program designed to strengthen tribal economic development, and, thus, their existence as a cohesive and functioning entity, the Montana Supreme Court seeks to undermine that very existence. This the plain language of section 17, its legislative background, and the decisions by the Department of the Interior, and section 5 of the charter itself, plainly disallow.

[3] The "sue and be sued" provision, subject to the judgment, lien, or attachment proviso, is included in all 88 charters ratified by Indian tribes under section 17 of the IRA. (This figure was compiled by Counsel for Amicus Curiae after review of all tribal corporate charters on file at the Department of the Interior, Bureau of Indian Affairs, Branch of Tribal Relations, in Washington, D. C., Nov. 23-24, 1976.) The "sue and be sued" provision, with no proviso, is included in all 67 charters ratified by Alaskan native villages. (*Id.* Section 17 of the IRA, 25 U.S.C. § 477 (1970), was applied to the then territory of Alaska by statute in 1936. 25 U.S.C. § 473a (1970).)

II. The Montana Supreme Court's expansive interpretation of the "Sue and Be Sued" Charter Provision Conflicts in Principle With the Decisions of This Court and of the Lower Courts Establishing the Doctrines of Indian Tribal Immunity and Governmental Immunity.

Each Indian tribe begins its relationship with the federal government as a sovereign, with powers subject to qualification only by treaties and by express congressional legislation; what is not expressly limited remains within the domain of tribal sovereignty. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U. N. Mex. 1971). *See also United States v. Mazurie,* 419 U.S. 544, 556-57 (1975). It is because of this sovereignty that this Court long has recognized that an Indian tribe is immune from suit without consent. *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). Such consent must by explicit, *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113, 114 (10th Cir. 1962),[4] and cannot be given by officials, *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 513 (1940).

These principles have been ignored by the Montana Supreme Court in the instant case. There is no consent given, explicit or otherwise, to suits arising out of the noncorporate actions of the Fort Belknap Indian Community. This Court has stressed that the question whether a sovereign has consented to suit primarily is one of intent. *E.g., Edelman v. Jordan,* 415 U.S. 651, 672 (1974). Nothing in the legislation or its

[4] The *Dicke* ruling is consistent with the decisions by this Court holding that a waiver of sovereign immunity by the United States, *United States v. Shaw,* 309 U.S. 495, 500-01 (1940), or by a state, *Edelman v. Jordan,* 415 U.S. 651, 673 (1974), must be express.

history indicates that the inclusion of a "sue and be sued" provision in the tribal charters was intended to apply to actions taken outside a tribe's corporate capacity. In fact, at the very time these charters were being developed, it was the position of the Department of the Interior, as reflected in its decisions and in the charters themselves, that the powers given the tribal corporation could not be exercised by the tribal government organized under section 16. This Court has recognized that the "dramatic" difference between an entity's proprietary functions and its governmental functions is important in deciding whether there has been an intent to waive sovereign immunity. *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279, 284-85 (1973). It is decisive in this case.

In *Fidelity & Guaranty,* this Court noted that the same public policy that exempts the "dominant" sovereign from suit, exempts the "dependent" sovereign. 309 U.S. at 512. This public policy includes the protection of the sovereign's financial coffers. *See Cohens v. Virginia,* 19 U.S. 120, 182, 6 Wheat. 264, 406-07 (1821). This policy applies with special force to Indian communities. Indian tribal governments simply cannot afford the liability to which the Montana Supreme Court has exposed them.

It also would undo the financial progress made by the tribes since, and as a result of, the IRA. It is the policy of Congress to strengthen further tribal governments and tribal economic development. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975). The resultant vitality, which Congress encouraged by enacting the IRA and the Self-Determination Act, is threat-

ened grievously by the Montana Supreme Court decision.

It is for the precise reason of protecting the tribes' financial existence that the doctrine of tribal immunity from suit remains a part of the law. This Court, and lower courts following that lead, has enunciated principles that ensure the protection of the tribes' sovereignty from state encroachment. In the instant case, the Montana Supreme Court has disregarded these principles to the severe detriment of the 88 incorporated tribes and the 67 incorporated native villages in this country, of all Indian people, and of everyone whose interest it is to retain a thriving indigenous people in the United States.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the Montana Supreme Court in this case should be granted.

Respectfully submitted,

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